STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

McLeodUSA Telecommunications Services, Inc.	:	
-vs-		
Illinois Bell Telephone Company (Ameritech Illinois)	:	00-0107
Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois under Sections 13-514 and 13-515 of the Public Utilities Act concerning imposition of special construction charges and seeking emergency relief pursuant to Section 13-515(e).	:	

ORDER

By the Commission:

I. INTRODUCTION

On January 31, 2000, McLeodUSA Telecommunications Services, Inc. ("McLeod") filed a verified Complaint against Illinois Bell Telephone Company d/b/a Ameritech Illinois ("Ameritech"), pursuant to Sections 13-514 and 13-515 of the Public Utilities Act ("Act"), 220 ILCS 5/1-101 et seq., concerning the imposition of special construction charges associated with the provision of unbundled network elements ("UNE"). McLeod also sought emergency relief under Section 13-515(e). At issue is this request for emergency relief. In accordance with Section 766.100(a) of 83 Ill. Adm. Code Part 766, a copy of the January 12, 2000 letter required by Section 13-515(c) notifying Ameritech of the alleged violation of Section 13-514 is attached to the Complaint as Exhibit B. Attached as Exhibit D is a draft order, which is also required by Section 766.100(a).

Pursuant to Section 766.1 IO(b) of Part 766, Ameritech was accorded until noon on February 1, 2000 to respond to McLeod's request for emergency relief. Three hours after the expiration of this deadline, Ameritech submitted a response in opposition to the request for emergency relief.

McLeod provides competitive resold and facilities-based local and interexchange telecommunications services pursuant to a certificate of authority granted by the Commission on December 6, 1995 in Docket No. 95-0425, and subsequently amended

on August 14, 1996 in Docket No. 96-0279. On August 28, 1998, Consolidated Communications Telecom Services, Inc. ("CCTS") merged into McLeod pursuant to a Commission Order dated July 8, 1998 in Docket No. 97-0638. CCTS entered into an interconnection agreement with Ameritech under which CCTS purchases, among other things, UNEs from Ameritech. This Commission approved interconnection agreement was assigned to McLeod by notice dated August 27, 1998. The CCTS interconnection agreement expired on October 27, 1999. Since that date, McLeod and Ameritech have been operating pursuant to the interconnection agreement between Ameritech and QST, Inc., a sister company to McLeod. Currently, McLeod serves residential and business customers in Springfield, Champaign, Decatur, and several other areas in Illinois.

II. STANDARD FOR EMERGENCY RELIEF

Section 13-515(e) of the Act empowers the Commission to grant an order for emergency relief without an evidentiary hearing "upon a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest."

III. . McLEOD'S POSITION

McLeod alleges in its verified Complaint that Ameritech has been requiring it to pay special construction charges up-front in order to purchase unbundled loops. McLeod purchases unbundled loops to provide facilities-based service to its end users. However, it is McLeod's understanding that Ameritech does not pass along similar charges to its retail customers in similar instances. Instead, when approached by a retail customer seeking the same service, McLeod claims that Ameritech installs the service, charges its normal tarriffed retail rates without adding any non-recurring special construction charges, and absorbs the cost it allegedly incurred to provide service to this customer. Clearly, if and to the extent true. this disparate treatment between its carrier and end use customers gives Ameritech an unfair competitive advantage, according to McLeod.

In addition, McLeod alleges that the recovery of special construction charges results in an inappropriate double recovery because the costs Ameritech seeks to recover through these charges *are* already being recovered through the total element long run incremental cost ("TELRIC") based pricing of the unbundled loops.

McLeod cites both the Act and the Telecommunications Act of 1996 ("TA96"), 47 U.S.C. 151 et seq., in support of its Complaint and request for emergency relief. Section 251(c)(3) of the TA96, reports McLeod. requires Ameritech to provide nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on "rates, terms and conditions that are just, reasonable and nondiscriminatory." McLeod states that Ameritech IS discriminating against it by adding

special construction charges for UNEs that it does not also seek to collect from its retail customers who obtain the same service, in violation of Section 251(c)(3). McLeod further contends that Ameritech's discriminatory practice has the effect of impairing its ability to offer facilities-based services to its customers, which in turn impedes the development of competition, in violation of Section 13-514 of the Act.

McLeod states that the relevant substantive allegations made in the Complaint are identical to those made in the complaint which was the subject of Docket No. 99-0525. The complaint in Docket 99-0525 was brought jointly by McLeod and Ovation Communications, Inc. d/b/a McLeodUSA ("Ovation"). The portion of that complaint relating to special construction charges for UNEs requested by McLeod was dismissed without prejudice on October 26, 1999. In its December 20, 1999 Order in that docket, McLeod relates that the Commission found that:

a., Ameritech discriminates against Ovation in the assessment of special construction charges and knowingly impeded the development of competition, and thus is in violation of Section 13-514 of the Act. "Ameritech's claim that it should be allowed to charge Ovation for special construction in a different manner than it charges its retail customers rings hollow when one considers that Ameritech's method of charging Ovation for special construction has no parameters or standards. Such discretion lends itself to abuse and prevents the Commission from exercising oversight to ensure that all competitive carriers are treated equally regardless of how Ameritech treats its retail customers... [S]pecial construction charges assessed on Ovation must be done so under specified rules and regulations as required by Section 9-104 of the Act.. To remedy the violation of Section 13-514, Ameritech must begin assessing special construction charges on Ovation and its retail customers in the same manner in accordance with the terms and conditions of Ill. C. C. No. 20, Part 2, Section 5." (Order, Docket No 99-0525, pp. 16-18)

b. Until further input is had in the context of Docket No. 99-0593, 'Ameritech may require Ovation to pay special construction charges up front so long as it requires retail customers to pay special construction charges up front as well. Ameritech must treat Ovation and retail customers the same in this respect since to do otherwise is anti-competitive. All else being equal. customers may be more apt to take service from Ameritech than Ovation if given the opportunity by Ameritech to spread costs over time." (Order, Docket No. 99-0525, p. 25)

c. The only possible scenario in which recovery of special construction charges would not result in a double recovery is when loop conditioning is performed. (Order, Docket No. 99-0525, p. 25)

On January 4, 2000, however, shortly after issuance of' the Commission's final Order in Ovation's complaint case, McLeod reports that Ameritech unveiled to McLeod, Ovation, and all other competitive local exchange carriers ("CLEC"), a new unbundled loop provisioning policy. Ameritech's policy, according to McLeod, describes when facilities will be deemed "available," the new definition of which is wholly inconsistent with the gist of the Commission's Ovation complaint Order. The new policy then specifies under what circumstances special construction charges will be assessed for modifications to available facilities, but does not include as a condition to assessment of those special construction charges the assessment of special construction to retail customers in similar circumstances, as required by the Ovation complaint Order, continues McLeod. Under the new policy, McLeod states that Ameritech imposes a fixed fee of $224.07 for special construction when one of the following modifications is required to provision an unbundled loop: (1) install plugs/cards where central office terminal technology is used: (2) the wire is out of limits but a facility exists at an adjacent terminal; (3) a previous service exists and the connected pair can be broken and moved to another terminal location; (4) a PG plus which allows Ameritech to derive lines off a copper pair; and (5) use of Universal Digital Carrier technology to derive two lines. Finally, McLeod states that Ameritech continues to impose unspecified special construction charges in the event that unbundled loops are provisioned from Integrated Digital Loop Carriers and Remote Switching Units, and to condition loops to provide digital services. McLeod maintains that in none of the aforementioned circumstances, except with respect to line conditioning, would special construction charges be permissible under the Order in Docket No. 99-0525, and conditioning charges would only be appropriate if comparable charges are assessed by Ameritech on its retail customers for service installation.

In addition, McLeod contends that Ameritech has implemented its new policy as to McLeod. In the days since the new policy's effectiveness, McLeod states that it has submitted at least two UNE orders as to which special construction charges were assessed for the provision of UNEs for voice service, i.e., not for conditioning of digital loops. Ameritech also refuses to process its orders, reports McLeod, unless bona fide requests ("BFR") are issued by McLeod. Although this new policy is not a direct violation of the Order in Docket No. 99-0525 as to McLeod, since that Order by its terms is limited to Ameritech's assessment of special construction charges to Ovation, McLeod avers that it is nonetheless contrary to the spirit and intent of that Order.

McLeod argues that the above described situation merits the issuance of an emergency order directing Ameritech to cease and desist from imposing special construction charges on McLeod unless Ameritech meets the requirements of the Order in Docket No. 99-0525, pending a final order in this docket. In other words, McLeod

asks the Commission to prohibit Ameritech from assessing special construction charges for any activities other than conditioning loops for digital subscriber line ("DSL") service.

As for the first criterion necessary to receive emergency relief, McLeod states that it is likely to succeed on the merits because all of the substantive allegations in this Complaint, with the exception of Ameritech's new policy, are virtually identical to those made in the complaint which initiated Docket No. 99-0525. In other words, because Ovation succeeded on the merits in Docket No. 99-0525, McLeod believes that it is likely that it will succeed on the merits of this allegedly virtually identical Complaint. Moreover, McLeod claims that Ameritech's new BFR policy appears to be designed to impede competition by placing McLeod, and indeed all CLECs, in the untenable position of having to decide whether to proceed with the BFR even though McLeod remains in the dark about what it will have to pay in special construction charges. Similarly, McLeod states that Ameritech's procedure related to assessment of flat charges for alleged special construction work does not give it a final say as to whether to proceed with an order after receiving notice that a flat charge applies. Moreover, McLeod finds it problematic that it can not determine from Ameritech's notice how much will be incurred in flat special construction charges. According to McLeod, a CLEC such as itself can not realistically operate in an environment where its cost of providing service to an end user is not known until after service is installed, and then require the CLEC to follow billing dispute procedures for each individual BFR.

With regard to the second criterion, McLeod argues that the harm its reputation suffers constitutes irreparable harm to its ability to serve customers. Specifically, if it can not determine in advance whether it is economical to serve a customer if special construction charges are assessed, McLeod has asserted it will not offer the service. McLeod states that it is still building its reputation, and it suffers an irreparable harm to that reputation each and every time it has to, in effect, tell a customer that the customer will be better off going to Ameritech since Ameritech can provide service far less expensively. Once McLeod turns away a customer, it maintains that its reputation is forever damaged. These facts are particularly compelling, argues McLeod, since a competitive local exchange market has not yet developed in the markets in which it offers competitive local service. The emergency relief offered by Section 13-515(e) is meant to prevent just this type of competitive harm, according to McLeod.

The third criterion necessary for granting emergency relief is that to do so must be in the public interest. Requiring Ameritech to immediately cease and desist from applying its new special construction charge policy and instead to comply with the outcome of Docket No. 99-0525, the Commission's most recent statement of policy concerning special construction, will enhance local competition, which will benefit the public, according to McLeod. Since competition is the paramount goal of the TA96, McLeod proffers that any actions which foster competition must be in the public interest.

IV. AMERFTECH'S POSITION

Ameritech maintains that McLeod's request is highly misleading and omits or distorts important facts. Specifically, Ameritech takes issue with McLeod's discussion of the aforementioned fixed fee of $224.07. According to Ameritech, this flat fee had already been eliminated for all carriers in Illinois; a fact which McLeod had been specifically informed of prior to filing its Complaint yet did not mention. Ameritech states that its special construction policy as reflected on its web site for CLECs will be updated effective February 2,/2000 to reflect the elimination of the flat fee. Ameritech also claims that McLeod has neglected to mention that in its response to McLeod's January 12, 2000 letter, Anieritech offered to amend the parties' interconnection agreement in a manner that would make the primary forms of relief ordered in Docket No. 99-0525 equally available to both McLeod and CCTS. Ameritech's offer is found in Exhibit A attached to its response to McLeod's request for emergency relief. Ameritech further states that it is willing to negotiate refunds for amounts paid in the past by McLeod and CCTS. In light of its removal of the fixed fee and. offer to amend its interconnection agreement with McLeod, Ameritech argues that the Complaint presents nothing even remotely resembling an emergency.

In addition to accusing McLeod of mischaracterizing facts, Ameritech claims that the Complaint is premature for several reasons, any one of which is sufficient to reject it. First, Ameritech notes that a generic investigation of its practices regarding special construction charges is already underway in Docket No. 99-0593. In light of such prior pending action involving the same parties and what it considers the same issues, Ameritech asserts that the Commission should refuse to address McLeod's Complaint at this time, including the request for emergency relief. Second, Ameritech claims that it and McLeod are currently negotiating a contract amendment dealing with special construction which may very well moot some or all of McLeod's claims. Ameritech relies upon a Commission conclusion in Docket No. 99-0465 which concerned a complaint brought by Rhythms Links, Inc. under Section 13-514. Ameritech reports that in that docket, the Commission concluded that it is inappropriate to allow a complaint to proceed when negotiations are continuing. Third, Ameritech insists that McLeod has not exhausted the dispute escalation provisions of their interconnection agreement with respect to the claims at issue. If McLeod initiated escalation on October 29, 1999, as indicated by Exhibit C attached to the Complaint, Ameritech asserts that the earliest that the escalation phases would be completed and McLeod could'file its Complaint would be February 11, 2000.

Ameritech also contends that McLeod has failed to meet any of the three criteria necessary for emergency relief to be granted. As indicated above, McLeod must show a likelihood of success on the merits. Ameritech notes that McLeod seems to rely heavily on alleged similarities between the instant Complaint and the complaint filed by Ovation. While Ameritech concedes that there are superficial similarities, it claims that the determinative facts are quite different. Because the McLeod complaint focuses on recent revisions to Ameritech's special construction policy, and those revisions did not

occur until after the Order was issued in Docket No. 99-0525, Ameritech argues that the factual issues in the present docket are substantially different from those in the Ovation docket.

Nor is McLeod likely to succeed by showing any misconduct by Ameritech because no such misconduct exists, according to Ameritech. With regard to the BFR process discussed by McLeod, Ameritech does not deny that it has refused to process certain McLeod orders and required a BFR. Instead, Ameritech insists that the BFR procedure is a rare exception to the standard service order request process, and that in any event, nothing in the Order in Docket No. 99-0525 bars such a procedure. Moreover, Ameritech states that its attorney informed McLeod's attorney, prior to the, filing of the Complaint, that it intends to fully comply with the Ovation order with respect to McLeod through an amendment to their interconnection agreement. Accordingly, Ameritech maintains that McLeod is not likely to succeed in showing any misconduct by Ameritech.

With regard to irreparable harm, Ameritech states that because it is not doing the things of which it is accused or in any way violating the Ovation order, McLeod is not likely to suffer any irreparable harm if its request for emergency relief is denied. Ameritech claims that McLeod is merely engaging in self-serving speculation about whatharms it conceivably might incur if Ameritech actually engaged in misconduct. Because, according to Ameritech, McLeod has not made a "verified factual showing," as required by Section 13-515(e), to support a claim a irreparable harm, the second statutory criterion is not satisfied. Furthermore, to the extent that McLeod seeks a refund of past charges, Ameritech argues that because McLeod may recover monetary losses if its prevails, such harm is not irreparable.

In addition, Ameritech asserts that granting emergency relief is not in the public interest, the third criterion, because to do so would invite dozens of Section 13-514 complaints filed by every other CLEC already participating in Docket No. 99-0593. Devoting Commissian resources to such other complaint dockets during the pendency of Docket No. 99-0593 is inefficient and therefore not in the pubic interest.

V. COMMISSION CONCLUSION

With only McLeod's Complaint and Amentech's response to McLeod's request for emergency relief to rely upon, determining whether McLeod should receive the requested emergency relief is no easy task. Unfortunately, the only clear conclusion which may be drawn from this scant record is that one (or both) of the parties has not been completely accurate or forthcoming in its description of the situation. Ameritech states that it has offered to incorporate into the interconnection agreement with McLeod the primary forms of relief ordered in Docket No. 99-0525, which seems to be what McLeod is seeking in its request for emergency relief. Evidence of this offer seems to exist in the letter dated January 13, 2000 and attached to Ameritech's response as Exhibit A, although McLeod makes no mention of it in its Complaint. Ameritech also

states that negotiations are taking place to amend the interconnection agreement in accordance with this offer. The exact nature of these negotiations and whether they are actually occurring is uncertain. At this point it is not possible to determine which elements of which party's story are reliable.

Similarly, it is unclear how Ameritech's new special construction charge policy is being applied. Apparently, Ameritech has described, in some fashion, its new policy to Illinois CLECs while its web site contains a different description. Ameritech seems to have decided to update its web site only after this Complaint was filed. Although the new policy seems at least similar to the old policy, it is not possible to say with confidence at this time that the new policy is substantially the same as the old policy so that McLeod is likely to succeed on the merits as Ovation did in its complaint under the old policy. Furthermore, to the extent that McLeod requests emergency relief from Ameritech's old policy, it does not appear, based on this evidence, that Ameritech still follows its old policy. Therefore, McLeod's request for emergency relief from a policy that is no longer followed is moot. For these reasons, it can not be said that McLeod has shown a likelihood of success on the merits.

Since it is not clear at this time that McLeod is likely to succeed on the merits, it is not necessary to address the remaining two criteria necessary to grant emergency relief: Accordingly, emergency relief should not be granted. The uncertainty surrounding whether negotiations are ongoing between Ameritech and McLeod is a secondary reason for denying emergency relief. If in fact Ameritech has offered to incorporate into its interconnection agreement with McLeod the primary forms of relief ordered in Docket No. 99-0525, it would not seem prudent, based on the existing record, to grant emergency relief to McLeod at this time.

Based on a review of the record herein, it is hereby found that:

(1) McLeod is an Iowa corporation which is authorized to provide exchange and interexchange services, and is a telecommunications carrier within the meaning of Section 13-202 of the Act;

(2) Ameritech is an Illinois corporation which is authorized to provide telecommunications services, and is a telecommunications carrier within the meaning of Section 13-202 of the Act;

(3) the Commission has jurisdiction over the parties and the subject matter herein:

(4) McLeod has not shown a likelihood of success on the merits;

(5) accordingly, McLeod's request for emergency relief should be denied: and

(6) the acceptance of Ameritech's untimely response to McLeod's request for emergency relief in this instance should not be construed as precedence regarding future filing deadlines.

IT IS THEREFORE ORDERED that McLeodUSA Telecommunications Services, Inc.'s request for emergency relief pursuant to Section 13-515(e) of the Public Utilities Act is hereby denied.

IT IS FURTHER ORDERED that this decision is not a final order and is not subject to the Administrative Review Law.

By order of the Commission this 4th day of February, 2000.

(SIGNED) RICHARD L. MATHIAS

Chairman

(SEAL)